16-3877 & 17-8

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES G. PAULSEN, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner-Appellee-Cross-Appellant,

v.

PRIMEFLIGHT AVIATION SERVICES, INC.,

Respondent-Appellant-Cross-Appellee.

ON APPEAL AND CROSS-APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLEE-CROSS-APPELLANT NATIONAL LABOR RELATIONS BOARD

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
BARRY J. KEARNEY
Associate General Counsel
JAYME L. SOPHIR
Deputy Associate General Counsel

ELINOR L. MERBERG
Assistant General Counsel
LAURA T. VAZQUEZ
Deputy Assistant General Counsel
JONATHAN M. PSOTKA
Attorney
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, S.E.
Washington, D.C. 20570-0001
(202) 273-2890

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INTRODUCTION

As explained in the opening cross-appeal brief of Appellee-Cross-Appellant James G. Paulsen, Regional Director ("Director") of Region 29 of the National Labor Relations Board ("Board"), the district court abused its discretion by prohibiting the parties from bargaining over or coming to an agreement on employee shift and staffing issues, and further abused its discretion by not ordering Appellant-Cross-Appellee PrimeFlight Aviation Services, Inc. ("PrimeFlight") to cease and desist from its unlawful conduct. PrimeFlight in its response brief raises no new defense of the district court's order, and does not address any of the arguments raised by the Director. Accordingly, the district court's injunction should be modified.

A. There is Ample Support that a District Court May Not Ignore Congressional Policy in Crafting Injunctions

Contrary to PrimeFlight's claim (Resp. Br. 26[1]), the statutory policy behind the Act and well-established case law limit the district court's equitable authority to dictate the substance of the parties'

[1] "Resp. Br." references refer to PrimeFlight's Response and Reply Brief of Defendant-Appellant-Cross-Appellee.

contract negotiations (Bd. Br. 54–60[2]). In suggesting that the Director "'cannot point to any holding or statutory language that limits a court's ability to fashion a preliminary injunction' in this manner," (Resp. Br. 26) PrimeFlight completely ignores and does nothing to distinguish the case law raised in the Director's brief (Bd. Br. 54, 58–60). PrimeFlight does not distinguish or contradict the Supreme Court's holding in *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 497 (2001) that a court cannot "ignore the judgment of Congress," "override Congress' policy choice," or "reject the balance that Congress has struck in the statute," even when sitting in equity. Nor does PrimeFlight in any way challenge Congress' determination that the NLRA only requires "private bargaining . . . without any official compulsion of the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). There is thus no defense for the district court's substitution of its own judgment for both Congress' and the parties' in ceding a major bargaining subject to PrimeFlight. By prohibiting bargaining over a core subject and thereby compelling the Union to concede to

[2] "Bd. Br." references refer to the Director's Brief for Petitioner-Appellee-Cross-Appellant National Labor Relations Board.

PrimeFlight all discretion about staffing levels the district court went against a central tenet of the Act and thereby abused its discretion.

B. The Staffing Limitation Seeks to Address an Unsupported Harm and is Unrelated to RLA Jurisdiction

PrimeFlight misses the mark when it contends that the court's bargaining limitation supports PrimeFlight's assertion that its operations are outside NLRB jurisdiction (Resp. Br. 27). Contrary to PrimeFlight's claim, the court's bargaining limitation is not an implicit recognition of JetBlue's control over PrimeFlight staffing. Rather, as fully discussed in the Director's brief (Bd. Br. 60–62), the court imposed the limitation out of a mistaken concern that the bargaining process would result in the Union "dictating" staffing levels to PrimeFlight, forcing it to schedule more employees than needed to service its customers. This concern is wholly unrelated to the question of whether a common carrier has "meaningful control" over PrimeFlight's personnel. *See Airway Cleaners, LLC*, 41 NMB 262, 268 (2014). The court acknowledging that PrimeFlight has contractual obligations to meet minimum staffing for its clients is not the same thing as finding that PrimeFlight's clients control its staffing. Nor is the acknowledgment that PrimeFlight has to meet minimum staffing levels

evidence that the NMB's jurisdictional standard is somehow arbitrary. Even if the district court's decision could be interpreted as a finding that JetBlue sets PrimeFlight's staffing levels, that has always only been one of many factors of control, and anyway is no greater than the control exercised in many typical subcontractor relationships. *See Menzies Aviation, Inc.*, 42 NMB 1, 6–7 (2014).

Moreover, as previously noted, the bargaining limitation was based on an erroneous assessment of the parties' relative harms. The district court's limitation on bargaining about shifts or staffing was designed to address the imagined harm that PrimeFlight would be required to have more employees working than were needed by its clients. However, simply because a party has a bargaining obligation does not oblige it to agree to any terms. *See H.K. Porter*, 397 U.S. at 108. If PrimeFlight has legitimate reasons to maintain complete discretion over staffing, it is well within its rights to insist on that position in bargaining, so long as it does so in good faith.

In addition, PrimeFlight does not address or contest that the limitation on bargaining about shifts and staffing is actively harming the Union and employees' Section 7 rights. As discussed in the

Director's brief, (Bd. Br. 61–62), the forced concession on staffing unfairly swings the balance of bargaining power toward PrimeFlight by prohibiting the Union from raising a subject of major concern to employees. Thus, while protecting PrimeFlight from an imaginary threat, the district court prevented bargaining about an issue vital to workers, the "hours" of "wages and hours." This both frustrates bargaining and undermines employee support for the Union.

Nor does PrimeFlight acknowledge the Director's point that the staffing limitation puts the parties in an untenable position. If they bargain about staffing, they are in contempt of the order, but if they refuse to bargain about staffing, they may become subject to an unfair-labor-practice charge for refusing to bargain.

C. The Court Abused its Discretion by Not Including a Cease and Desist Order in the Injunction

Likely recognizing the standard nature of the relief requested, PrimeFlight in its brief fails to acknowledge or respond to the Director's argument that the district court abused its discretion when it did not order PrimeFlight to cease and desist from its unlawful conduct. As discussed in the Director's brief (Bd. Br. 62–63), Congress determined that violations of the Act should be met with a cease and desist order.

29 U.S.C. § 160(c). As discussed above, courts sitting in equity to enforce a statute should be guided by the policies enshrined therein. *See Morio v. N. Am. Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980). The district court provided little justification for why these straightforward rules should be ignored in this case, and the failure to follow them is an abuse of discretion.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Director's Opening Brief, the Director respectfully requests that the Court affirm the district court's grant of interim relief, but direct the court to alter the order to no longer prevent bargaining or agreement on staffing, and to add appropriate cease and desist language.

Respectfully submitted,

/s/ Elinor L. Merberg
ELINOR L. MERBERG
Assistant General Counsel

/s/ Laura T. Vazquez
LAURA T. VAZQUEZ
Deputy Assistant General Counsel

/s/ Jonathan M. Psotka
JONATHAN M. PSOTKA
Attorney

National Labor Relations Board
1015 Half Street SE
Washington, DC 20570-0001
(202) 273-3833
(202) 273-3832
(202) 273-2890

Fax: (202) 273-4275
Elinor.Merberg@nlrb.gov
Laura.Vazquez@nlrb.gov
Jonathan.Psotka@nlrb.gov

June 5, 2017

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of 7,000 words set forth in Fed. R. App. P. 28.1.1(c), because this brief contains 1,098 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Word 2013 in proportionally spaced, 14-point Century Schoolbook.

/s/Jonathan M. Psotka
Jonathan M. Psotka
Attorney
National Labor Relations Board
1015 Half Street, S.E.
Washington, D.C. 20570
(202) 208-2890

Dated at Washington, D.C.
this 5th day of June 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2017, I electronically filed the foregoing brief and addendum with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully submitted,

/s/ Jonathan M. Psotka
Attorney

Dated at Washington, D.C.
This fifth day of June 2017